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No. 89-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EXXON CORPORATION,
Petitioner,

vs.

WYOMING STATE BOARD OF EQUALIZATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

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QUESTION PRESENTED

Does the Commerce Clause of the United States Constitution prohibit the state of Wyoming from imposing an unapportioned use tax against the purchase price of certain pipe installed by Petitioner in its pipeline in Wyoming, when no credit against such use tax is granted for a similar tax previously and legally paid by Petitioner to the state of Colorado with respect to the purchase price of such pipe?

RULE 28.1 STATEMENT

A list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner Exxon Corporation, as required by Rule 28.1, is set forth as Appendix D.

PARTIES

The parties to the proceeding in this Court are the same as the parties to the proceeding in the Wyoming Supreme Court.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE WYOMING SUPREME COURT

Petitioner Exxon Corporation ("Exxon") respectfully petitions this Court for a writ of certiorari to review the judgment of the Wyoming Supreme Court in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Wyoming Supreme Court, reproduced as Appendix A, are reported at 783 P.2d 685. The ruling of the Wyoming State Board of Equalization, reproduced as Appendix B, is not reported.

JURISDICTIONAL STATEMENT

The judgment of the Wyoming Supreme Court, reproduced as Appendix A, was entered on December 7, 1989. No petition for rehearing in the Wyoming Supreme Court was filed, and no extension of time to file a petition for writ of certiorari in this Court has been sought. This Court has jurisdiction to review the judgment of the Wyoming Supreme Court by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Wyo. Stat. § 39-6-504 (1977) provides, in pertinent part, as follows:

> (a) Except as otherwise provided, there is levied and shall be paid by the purchaser an excise tax of three percent (3%) upon sales in Wyoming. The vendor shall collect the tax and give the purchaser a receipt therefor displaying the tax paid separately.
>
> (b) Persons storing, using or consuming tangible personal property are liable for the tax imposed by this article. The liability is not extinguished until the tax has been paid to the state but a receipt given to the person by a registered vendor in accordance with subsection (a) of this section is sufficient to relieve the purchaser from further liability.
>
> (c) Tangible personal property sold by any person for delivery in this state is deemed sold for storage, use or consumption herein and is subject to the tax imposed by this article unless the person selling the property has received from the purchaser a signed certificate stating the property was purchased for resale and showing his name and address.
>
> * * *

Wyo. Stat. § 39-6-502 (1977), as in effect during the time at issue in this case, provides, in pertinent part, as follows:

> (a) As used in this article:
>
> (i) "Retail sale" means the sale of tangible personal property to a person for storage, use or consumption and not for subsequent resale;
>
> (ii) "Sale" means the transfer of title or possession of tangible personal property from a vendor for a consideration for storage, use or other consumption in Wyoming;
>
> (iii) "Sales price" means the consideration paid by the purchaser of tangible personal property excluding the actual trade-in value allowed on tangible personal property exchanged at the time of the transaction;
>
> (iv) "Storage" means the keeping or retention in this state of tangible personal property purchased from a vendor for any purpose except for sale in the course of business or subsequent use outside the state;

(v) "Tangible personal property" means all property not real or intangible;

* * *

(vii) "Use" means the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract

* * *

Wyo. Stat. § 39-6-505(a)(i) (1977) provides, in pertinent part, as follows:

(a) The following purchases or leases are exempt from the excise tax imposed by this article:

(i) Purchases which are taxable under the provisions of the Selective Sales Tax Act of 1937

* * *

STATEMENT OF THE CASE

Between February and May, 1985, Exxon purchased 258,000 feet of 24-inch line pipe from Marubeni American Corporation ("Marubeni"), a Texas vendor. The pipe was shipped from Marubeni's supplier located in Japan, through Portland, Oregon, to Exxon at the rail yard of Energy Coating Company ("Encoat") near Fort Collins, Colorado. Possession of and title to the pipe passed to Exxon upon delivery of the pipe to Exxon at Encoat's rail yard, and Exxon paid Marubeni for the pipe.

Encoat, pursuant to a contract with Exxon, unloaded and inspected the pipe at its plant in Colorado and sandblasted the pipe and coated it with a thin-film epoxy. This process took approximately 90 to 120 days. After the sandblasting and coating process was complete, the pipe was transported by a separate contractor of Exxon's to Wyoming, where it was installed as part of Exxon's Shute Creek to Rock Springs, Wyoming pipeline.

As a result of an internal audit, Exxon determined that Marubeni was not a licensed retailer in Colorado and therefore had not collected Colorado sales tax with respect to the sale of the pipe to Exxon. On January 20, 1986, Exxon filed an amended Colorado sales tax return for the months of March and May, 1985, and paid

Colorado a tax of $395,346.86 (representing 3% of the purchase price of the pipe), plus interest. This tax was legally required to be paid under Colorado law, which imposes a 3% sales tax on the purchase price paid or charged on all retail sales and purchases of tangible personal property in Colorado and a 3% compensating use tax on the privilege of storing, using, or consuming in Colorado any articles of tangible personal property purchased at retail. Colo. Rev. Stat. §§ 39-26-104(1)(a) and 39-26-202(1) (1982 and Supp. 1989).

Subsequently, the Wyoming Department of Revenue and Taxation (the "Department") conducted a sales and use tax audit of Exxon for the period from March 1, 1983, through February 28, 1986. As a result of that audit, the Department assessed Wyoming use tax against Exxon's use of the pipe in Wyoming, at the rate of 4%[1] of Exxon's purchase price of the pipe ($527,195.79), plus interest. The Department refused to grant a credit against this assessment for the tax that Exxon had already paid to Colorado.

Exxon appealed the Department's use tax assessment to the Wyoming State Board of Equalization (the "Board"), which upheld the assessment after conducting an evidentiary hearing. *See* Appendix B. Exxon appealed the Board's decision to the Laramie County District Court, asserting, among other grounds, that the imposition of the Wyoming use tax against the purchase price of the pipe without the granting of a credit for the Colorado tax paid violated the Commerce Clause of the United States Constitution. *See* Appendix C. The case was certified by the district court to the Wyoming Supreme Court pursuant to Wyoming appellate rules providing for such certification without the need for a ruling by the district court.

The Wyoming Supreme Court held, by a four-to-one vote, that Exxon's first use of the pipe occurred in Wyoming, not in Colorado, and that the Wyoming use tax was therefore properly imposed under Wyoming law. Appendix A at A-6. The court also ruled, by the same four-to-one vote, that Wyoming law did not provide for the granting of a credit against the Wyoming use tax for the tax paid to Colorado, because the tax paid to Colorado was (in the opinion of the majority

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[1] The 4% use tax rate is comprised of the 3% state use tax imposed by Wyo. Stat. § 39-6-504 (1977) and a 1% local use tax imposed under the authority of Wyo. Stat. § 39-6-518 (1977) by Sweetwater County, where the pipe was installed.

of the court) a use tax rather than a sales tax. [2] Appendix A at A-7. Finally, the court ruled, again by the same four-to-one vote, that the imposition of Wyoming's use tax against the purchase price paid by Exxon for the pipe, without the granting of a credit for the tax previously paid to Colorado, did not violate the Commerce Clause of the United States Constitution. Appendix A at A-8 & 9. It is this last ruling that Exxon asks this Court to review.

REASON FOR GRANTING THE PETITION

WYOMING'S IMPOSITION OF AN UNAPPORTIONED USE TAX, WITHOUT GRANTING A CREDIT FOR A SIMILAR TAX PREVIOUSLY AND LEGALLY PAID TO COLORADO WITH RESPECT TO THE SAME PROPERTY, CONSTITUTES AN IMPERMISSIBLE BURDEN ON AND DISCRIMINATION AGAINST INTERSTATE COMMERCE, AND THEREFORE RAISES AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE ON WHICH THIS COURT SHOULD RULE.

A. THE WYOMING SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE THAT HAS BEEN EXPRESSLY RESERVED BY THIS COURT.

The Wyoming Supreme Court held in this case that the Commerce Clause of the United States Constitution does not prevent a state from imposing an unapportioned use tax against the purchase price of property used in the state, without granting a credit against such tax for a similar tax previously and legally paid to another state on the purchase price of that property. The result of that holding is the imposition of two similar state taxes against the purchase price paid by Exxon for the pipe that is at issue in this case. On a broader scale, the rationale underlying the Wyoming Supreme Court's decision raises an ominous threat of multiple state taxation for taxpayers who own or use property that moves among several states.

Under the rationale of the Wyoming Supreme Court's ruling in this case, the full purchase price of an item of property that moves

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[2] The obvious inconsistency between these two holdings did not go unnoticed. *See* the dissenting opinion of Justice Urbigkit, Appendix A at A-9 ("Thus presented are the strange ingredients in this case. First, it is said the pipe was not used in Colorado, it is then argued the Colorado tax was a use tax . . . .").

among several states may be taxed by every state in which the item is used or comes to rest, without the granting of any credit for similar taxes paid to other states. If this ruling is allowed to stand, the cumulative tax burden that may be borne by property moving among the several states will constitute a substantial burden upon the free movement of goods in interstate commerce. This burden upon the free movement of goods in interstate commerce raises important issues regarding the application of the Commerce Clause of the United States Constitution to state excise taxes, which should be settled by this Court. These issues arise not only in the context of sales and use tax statutes, but also in the rapidly-developing area of state excise taxes on services and telecommunications. Many states and local jurisdictions are presently evaluating and adopting such excise taxes on services and telecommunications, and guidance on the Commerce Clause requirements applicable to such taxes may help avoid litigation and the imposition of cumulative tax burdens on such interstate transactions.

The Wyoming Supreme Court specifically rejected Exxon's contention that the Commerce Clause imposes a requirement that a state grant a credit against its use tax for sales or use tax paid to another state with respect to the same property. As this Court has observed, "[s]uch a requirement has been endorsed by at least one state court, *Montgomery Ward & Co.* v. *State Board of Equalization*, 272 Cal.App.2d 728, 78 Cal.Rptr. 373 (1969), cert. denied, 396 U.S. 1040 (1970), . . . and has significant support in the commentary . . . ." *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985). *See* J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 781 (5th Ed. 1988); McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 THE URBAN LAWYER 529, 553-54 (1985); Note, *Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 999-1000 (1962). This Court has relied upon the presence of credit provisions in state excise tax statutes in upholding such statutes against Commerce Clause challenges. *See, e.g., Goldberg* v. *Sweet*, 109 S.Ct. 582, 590 (1989); *D.H. Holmes Co.* v. *McNamara*, 108 S.Ct. 1619, 1623-24 (1988). However, the Court has specifically reserved the question of whether such credit provisions are required by the Commerce Clause. *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985); *Southern Pac. Co.* v. *Gallagher*, 306 U.S. 167, 172 (1939); *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 587

(1937) ("It will be time enough to mark [the limits on a state's power to frame its tax system] when a taxpayer paying in the state of origin is compelled to pay again in the state of destination"). Exxon in this case is a taxpayer paying in the state of original delivery who has been compelled to pay again in the state of ultimate destination. It is, therefore, time to determine whether such multiple taxation of goods moving in interstate commerce violates the Commerce Clause.

B. THE WYOMING SUPREME COURT'S DECISION UPHOLDS THE IMPOSITION OF AN ACTUAL MULTIPLE TAX BURDEN ON AND DISCRIMINATION AGAINST INTERSTATE COMMERCE AND THEREFORE CONFLICTS WITH THIS COURT'S PRECEDENTS.

While this Court has not previously settled the Commerce Clause question decided by the Wyoming Supreme Court in this case, the rationale applied by the Court in testing the constitutional validity of other state tax statutes demonstrates that Wyoming's imposition of its use tax in this case violates the Commerce Clause. As articulated by the Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), a state tax on a transaction or activity related to interstate commerce is tested under the Commerce Clause by examining the "practical effect" of the tax. A tax is constitutionally valid if it meets a four-prong test: (1) the activity that is the subject of the tax must have a sufficient nexus with the taxing state to justify the tax; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the benefits provided by the taxing state. 430 U.S. at 279. Before the Wyoming Supreme Court, Exxon contended that Wyoming's imposition of its use tax in this case without providing a credit for the Colorado tax previously paid violated the fair apportionment and nondiscrimination prongs of this *Complete Auto* test. In rejecting Exxon's contention, the Wyoming Supreme Court incorrectly applied these two prongs of the *Complete Auto* test.

1. The Wyoming Use Tax Imposed in this Case Is Not Fairly Apportioned.

With respect to the fair apportionment prong of the *Complete Auto* test, the Wyoming Supreme Court concluded that Wyoming's use tax was fairly apportioned "since it taxes only the use of the pipe

in Wyoming." Appendix A at A-8. This statement reveals the Wyoming Supreme Court's confusion of the fair apportionment prong of the *Complete Auto* test with the nexus requirement (which Exxon concedes has been met in this case). Certainly, the pipe in question in this case was used in Wyoming. However, the pipe was also delivered to Exxon in Colorado and was unloaded, inspected, sandblasted, and coated by Exxon's contractor in Colorado, giving rise to the imposition by Colorado of a tax (characterized as a *use* tax by the Wyoming Supreme Court) on the purchase price paid by Exxon for the pipe. Since the taxable event (exercise of ownership rights over the pipe by Exxon) occurred in more than one state, Wyoming was required by the fair apportionment prong of the *Complete Auto* test to provide some mechanism to apportion the tax burden among the states in which the taxable event occurred. The Wyoming use tax statute contains no such mechanism.

Most of the discussion of the fair apportionment prong of the *Complete Auto* test has taken place in the context of state income tax statutes providing for the division by formula of the income of a corporation among the various states in which the corporation conducts business. *See, e.g., Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 180-84 (1983); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 276-81 (1978). The inclusion of such an apportionment formula in state sales and use tax statutes is rare, however, and no such apportionment formula is contained in the Wyoming use tax statute at issue here. Thus, the Wyoming use tax in this case was imposed against the full, unapportioned purchase price paid by Exxon for the pipe.

In other cases involving unapportioned state excise taxes, this Court has held that the fair apportionment prong of the *Complete Auto* test was met where the tax provided for a credit against such tax for similar taxes paid to other states. *Goldberg* v. *Sweet*, 109 S.Ct. 582, 590 (1989); *D.H. Holmes Co.* v. *McNamara*, 108 S.Ct. 1619, 1623-24 (1988). In the present case, the Wyoming Supreme Court specifically held that no such credit was permitted under Wyoming law for the tax paid to Colorado with respect to the pipe. Appendix A at A-7. Since Wyoming's use tax was not apportioned and did not provide a credit for the tax previously and legally paid to Colorado, the "practical effect" of the tax, as demonstrated by the facts of this case, was the imposition of a multiple tax burden on interstate commerce. This multiple tax burden is not hypothetical or speculative

but very real: Exxon has paid two state taxes levied against its purchase price of the pipe. Such multiple taxation is the precise evil that the fair apportionment prong of the *Complete Auto* test was intended to prevent. As this Court has said, "Logically it is impossible, when the tax is fairly apportioned, to have the same income [in this case, transaction] taxed twice." *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450, 462 (1959).

In recent cases, the Court has analyzed the fair apportionment prong of the *Complete Auto* test by applying an "external consistency" and an "internal consistency" test to state tax statutes challenged on Commerce Clause grounds. *See, e.g., Goldberg* v. *Sweet*, 109 S.Ct. 582, 588-89 (1989); *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983). As described in the *Goldberg* case, the external consistency test "asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." 109 S.Ct. at 589. The Wyoming use tax imposed in this case clearly violates this test, since Wyoming taxed 100% of the tax base (the purchase price paid by Exxon for the pipe) without apportionment or credit for a similar tax paid to another state, even though the taxable event (exercise of ownership rights over the pipe) undeniably occurred in more than one state. Significantly, the Court in the *Goldberg* case held that Illinois' unapportioned telecommunications excise tax met the external consistency test because the possibility of multiple taxation was limited and the Illinois statute contained a credit provision that avoided actual multiple taxation — two factors that are conspicuously absent in the present case. 109 S.Ct. at 590.

The *Goldberg* case also described the internal consistency test, as follows:

> To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. . . . Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.

109 S.Ct. at 589. In the present case, it is not necessary to consider hypothetical situations, because Wyoming and Colorado have adopted sales and use tax statutes that, by their terms, are quite

similar. Both Wyoming and Colorado have adopted use tax statutes that are designed to be complementary to their retail sales tax statutes. Both states' use tax statutes, by their terms, apply to persons storing, using, or consuming tangible personal property in the respective states, and both states' statutes define the taxable event to mean the exercise of any right or power over tangible personal property incident to ownership of the property. *Compare* Wyo. Stat. §§ 39-6-504(b) and 39-6-502(a)(iv) and (vii) (1977) *with* Colo. Rev. Stat. §§ 39-26-202(1) and 39-26-201(3) (1982 and Supp. 1989). However, the absence of a credit provision in Wyoming's use tax statute for the tax paid to Colorado has resulted in double taxation in this case — a situation that would not occur if the activities taking place in Colorado and Wyoming were reversed, since Colorado's use tax statute contains a credit provision that allows it to meet the internal consistency test. Colo. Rev. Stat. § 39-26-203(1)(k) (1982).

The Wyoming Supreme Court's holding that the Wyoming use tax imposed in this case was fairly apportioned, in the face of the actual multiple taxation that has occurred, runs counter to the decisions of this Court and to the very purpose of the Commerce Clause to ensure an area of free trade among the states. The ruling increases the likelihood that states will seek to impose unapportioned taxes on goods or transactions with which they have nexus, thus imposing multiple state tax burdens on such goods and transactions that have nexus with more than one state. In order to prevent the resulting burden on interstate commerce, this Court should review the decision of the Wyoming Supreme Court and clarify the application of the fair apportionment prong of the *Complete Auto* test in the sales and use tax context.

2. The Wyoming Use Tax Imposed in this Case Discriminates Against Interstate Commerce.

Before the Wyoming Supreme Court, Exxon asserted that the Wyoming use tax imposed in this case discriminated against interstate transactions, in violation of the nondiscrimination prong of the *Complete Auto* test. The Wyoming Supreme Court held that the Wyoming tax did not discriminate against interstate commerce "because the tax is designed to compensate the State for revenue lost on out-of-state purchases of goods used in this state and is equal to the sales tax on the same goods had they been purchased in Wyoming." Appendix A at A-8. Again, this explanation by the Wyoming

Supreme Court is inconsistent with this Court's application of the nondiscrimination prong of the *Complete Auto* test in other cases.

Perhaps the most complete description of the nondiscrimination requirement in the context of a use tax statute is that provided by Justice Cardozo in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). While that case pre-dates the *Complete Auto* decision by 40 years, the Court's analysis of the nondiscrimination requirement of the Commerce Clause as applied to the Washington use tax at issue in that case remains highly relevant:

> Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.
>
> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

300 U.S. at 583-84.

The essential equality between intrastate and interstate transactions that resulted from the credit provisions in the Washington use

tax statute at issue in the *Henneford* case is completely absent from Wyoming's application of its use tax statute to Exxon's pipe in this case. Wyoming grants an exemption from its use tax for property previously subjected to the Wyoming sales tax. Wyo. Stat. § 39-6-505(a)(i) (1977). Thus, if Exxon had engaged in a purely intrastate transaction by purchasing the pipe in Wyoming and by having the pipe delivered, inspected, sandblasted, and coated in Wyoming prior to the installation of the pipe in the pipeline, the pipe would have been exempt from the use tax that Wyoming has imposed in this case. However, because Exxon engaged in an interstate transaction by purchasing the pipe outside of Wyoming and by having the pipe delivered, inspected, sandblasted, and coated in Colorado, the exemption for property purchased in Wyoming did not apply.

This facial discrimination against the interstate transaction as compared to the intrastate transaction is not eliminated by the fact that the intrastate transaction would be subject to the Wyoming sales tax. Exxon's purchase of the pipe and its exercise of ownership rights in the pipe outside of Wyoming gave rise to a legal Colorado tax on the purchase price of the pipe that was in all material respects the functional equivalent of the Wyoming sales tax. Wyoming has refused to provide the Colorado tax, by exemption or by credit, an equivalent status to that accorded to its own sales tax. Therefore, Exxon has been forced to pay two taxes on the interstate transaction, when only one tax would have been due if Exxon had engaged in the entire transaction wholly within the state of Wyoming. The resulting discrimination against the interstate transaction as compared to the intrastate transaction could not be more obvious. Such discrimination in favor of local commerce over interstate commerce has resulted in the invalidation by this Court of a number of state taxes. *See, e.g., New Energy Co. of Indiana* v. *Limbach*, 108 S.Ct. 1803, 1807-08 (1988); *American Trucking Ass'ns, Inc.* v. *Scheiner*, 107 S.Ct. 2829, 2840-41 (1987); *Tyler Pipe Industries, Inc.* v. *Washington Dep't of Revenue*, 107 S.Ct. 2810, 2820 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 273 (1984); *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 644-45 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725, 759-60 (1981); *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 332 (1977). Because the Wyoming Supreme Court's decision conflicts with these cases, this Court should review that decision and clarify the application of the nondiscrimination prong of the *Complete Auto* test in the context of sales and use tax statutes.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

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March, 1990

APPENDIX

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D.	List of Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates of Petitioner Exxon Corporation Pursuant to Rule 28.1	A-31

APPENDIX A

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A.D. 1989

December 7, 1989

EXXON CORPORATION, a New Jersey corporation, *Petitioner,*	)	
v.	)	No. 88-132
WYOMING STATE BOARD OF EQUALIZATION, *Respondent.*	)	

Certification from the District Court of Laramie County, the Honorable Nicholas G. Kalokathis, Judge.

Lawrence J. Wolfe of Holland & Hart, Cheyenne, WY; Alan Poe of Holland & Hart, Englewood, CO; and Kenneth Reither, Exxon Company U.S.A., Houston, TX, for petitioner. Argument presented by Mr. Wolfe.

Joseph B. Meyer, Attorney General; Peter J. Mulvaney, Deputy Attorney General; Michael L. Hubbard, Senior Assistant Attorney General; and Robert J. Walters, Assistant Attorney General, for respondent. Argument presented by Mr. Hubbard.

Before CARDINE, C.J., and THOMAS, URBIGKIT, MACY and GOLDEN, JJ.

CARDINE, C.J., delivered the opinion of the Court. URBIGKIT, J., filed a dissenting opinion.

CARDINE, Chief Justice.

Petitioner, Exxon Corporation, challenges the State's imposition of a use tax on pipe purchased out of the state and installed in a pipeline operating in Wyoming and the failure of the State to grant Exxon a credit against that tax for taxes already paid to the state of Colorado. The State Board of Equalization found that the tax was properly assessed, that it did not violate the commerce clause of the United States Constitution, and that the denial of the offsetting credit was proper.

We affirm.

Petitioner states the issues as:

> "I. Did the Board err in upholding a Wyoming use tax assessment against Exxon's use of certain line pipe in Wyoming, when the first use of that pipe, as the term 'use' is defined under Wyoming law, occurred in Colorado?
>
> "II. Did the Board err in refusing to grant a credit against the Wyoming use tax assessment for taxes paid by Exxon to the State of Colorado with respect to the pipe, where such taxes were legally imposed under Colorado law?
>
> "III. Did the Board's imposition of the Wyoming use tax against Exxon's use of the pipe in Wyoming, without providing a credit for the Colorado tax paid by Exxon, violate the commerce clause of the United States Constitution?"

Respondent phrases the issues:

> "I. Is the decision of the appellee [respondent] State Board of Equalization holding appellant [petitioner] liable for Wyoming use taxes despite initial delivery of the underlying property to the State of Colorado is not [sic] arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence?
>
> "II. Does the decision of the appellee [respondent] below violate the Commerce Clause of the United States Constitution?"

The essential facts of this case are not disputed and are as follows. Between February and May of 1985, Exxon Corporation

(Exxon), a New Jersey corporation, purchased 258,000 feet of 24-inch pipe from Marubeni American Corporation (Marubeni), a Texas vendor. The pipe, costing a total of $13,179,894.83, was to be installed as part of the Shute Creek to Rock Springs CO_2 pipeline in Wyoming. After purchase, the pipe was shipped from Kasaoka, Japan, through Portland, Oregon, to Fort Collins, Colorado. There it was inspected, sand blasted, and coated with a thin-film epoxy, processes necessary for the ultimate use of the pipe. After these processes were completed, which took approximately 90 to 120 days, the pipe was shipped to Wyoming and installed in the pipeline.

Exxon later discovered through an internal audit that Marubeni had not collected any tax with respect to the pipe. Exxon determined that a 3 percent tax was due the state of Colorado and voluntarily filed an amended return covering the months of March and May, 1985, and paid a tax in the amount of $395,396.84 plus interest.

Later, the Wyoming Department of Revenue and Taxation (Department) conducted a sales and use tax audit of Exxon, for the period of March 1, 1983, through February 28, 1986; the Department determined that Exxon was liable for a 4 percent use tax to the state of Wyoming on the pipe, pursuant to W.S. 39-6-504, 39-6-412, and 39-6-518.[1] In a final administrative decision, the Department concluded that the first use of the pipe[2] had occurred in Wyoming and assessed a use tax against Exxon in the amount of $527,195.79 plus interest. In assessing the tax, the Department further denied Exxon a credit against the use tax for the amount of tax previously paid to Colorado because the tax paid to Colorado was a use tax for which no credit was permitted under the governing statutes.

Exxon timely appealed the Department's assessment to the State Board of Equalization (Board). At an evidentiary hearing, Exxon contended that its use of the pipe in Wyoming was not subject to the use tax because the "first use" of the pipe, as that phrase is

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[1] W.S. 39-6-504 provides for a 3 percent excise tax on persons storing, using or consuming tangible personal property in the state. An additional 1 percent tax is imposed pursuant to W.S. 39-6-412 and 39-6-518, which allow a county to impose its own excise tax upon storage, use and consumption of tangible personal property in the county. Sweetwater County, where the pipe was installed, elected to impose the additional tax.

[2] *See infra* fn.3, for wording of Chapter IV, § 3 of the Rules and Regulations of the Wyoming State Tax Commission.

contemplated in the tax commission's rules and regulations and as the term "use" is defined by Wyoming law, occurred in Colorado. Alternatively, Exxon argued that if a use tax were indeed owed, such a tax should be offset by the amount of tax paid to the state of Colorado as a result of the activities with respect to the pipe in that state. Finally, Exxon contended that the imposition of the use tax by Wyoming, without the offsetting credit for the tax already paid to Colorado, constituted a violation of the commerce clause by creating an undue burden on and discrimination against interstate commerce. The Board rejected each of Exxon's arguments and affirmed the use tax assessment against Exxon and the denial of the offsetting credit.

Exxon paid the assessment and interest under protest and filed a timely petition for review of the Board's order in the First Judicial District Court. Pursuant to Rule 12.09, W.R.A.P., the case was certified to this court.

When a case is certified to this court under Rule 12.09, "we must review the decision of the [Board] under the appellate standards applicable to a reviewing court of the first instance." *Application of Campbell County*, 731 P.2d 1174, 1175 (Wyo. 1987). The scope of review of an agency action is established in W.S. 16-3-114(c):

> "To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:
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> "(i) Compel agency action unlawfully withheld or unreasonably delayed; and
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> "(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:
>
> "(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

"(B) Contrary to constitutional right, power, privilege or immunity;

"(C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;

"(D) Without observance of procedure required by law; or

"(E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute."

See Safety Medical Services, Inc. v. *Employment Security Comm'n*, 724 P.2d 468, 471-72 (Wyo. 1986); *Trout* v. *Wyoming Oil and Gas Conservation Comm'n*, 721 P.2d 1047, 1049 (Wyo. 1986); *Board of County Comm'rs* v. *Teton County Youth Services, Inc.*, 652 P.2d 400, 411 (Wyo. 1982). This court must examine the entire record to determine if there is substantial evidence to support the agency's findings; if an agency's decision is supported by substantial evidence, this court cannot properly substitute its judgment for that of the agency and must uphold the agency's findings on appeal. *Trout*, 721 P.2d at 1050. Substantial evidence is "relevant evidence which a reasonable mind might accept in support of the conclusions of the agency." *Id.*

In its brief on appeal, Exxon claims that the Board's order upholding the use tax assessment is arbitrary and capricious, unsupported by substantial evidence, and lacks statutory right in that it alters or impairs "the statutory definition of 'use.' " The Board made findings of fact and conclusions of law in support of its order. Exxon agrees that the facts are not in dispute but contends that the Board's application of relevant law to the facts was erroneous.

The Wyoming use tax statutes, W.S. 39-6-501 through -518, impose an excise tax upon "persons storing, using or consuming tangible personal property" in Wyoming. W.S. 39-6-504(b). The legislature intended that the use tax be complementary to the Wyoming sales tax. *Morrison-Knudson Co., Inc.* v. *State Board of Equalization*, 58 Wyo. 500, 135 P.2d 927, 932 (1943). *See also* Chap. IV, § 3, Rules and Regulations of the Wyoming State Tax Commission — Department of Revenue & Taxation. The use tax is applied to property purchased outside the state and brought into the state for storage, use or consumption, so as to put that property on an equal

footing with property purchased within the state that is subject to the Wyoming sales tax. *Id.*

Wyoming has placed a self-imposed limitation on the broad authority to tax property bought outside but used inside this state. Through Chapter IV, §§ 3 and 8 of the Rules and Regulations of the Wyoming State Tax Commission — Department of Revenue and Taxation (hereinafter referred to as Chap. IV, §§ 3 and 8), the State is permitted to apply the use tax to particular tangible personal property bought out of state only if the use of the property in Wyoming constitutes its "first use."[3] "Use" is defined in Wyoming as "the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract." W.S. 39-6-502(a)(vii). By implication, and as a logical extension, if the first use of the property occurs in another state, Wyoming's use tax is inapplicable.

Petitioner argues that the use tax imposed by Wyoming was improper because the "first use" of the pipe, as that phrase is contemplated by Chap. IV, § 3 and as the term "use" is statutorily defined, occurred in Colorado through its delivery and the coating process that occurred there. Thus, the question we must determine is whether the activities in Colorado constitute a bona fide first use of the property rendering the Wyoming use tax inapplicable. Exxon characterizes the actions taken in Colorado with respect to the pipe as an exercise of a "right or power over tangible personal property incident to ownership." W.S. 39-6-502(a)(vii). We disagree with this characterization.

The activities in Colorado were merely processes necessary to prepare the pipe for the use intended, i.e., its installation into and ultimate use as part of the Shute Creek CO_2 pipeline in Wyoming.

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[3] Chap. IV, § 3 provides:

"The purchase or lease of all tangible personal property outside this state for *first use*, storage or consumption within this state, is subject to use tax, providing the same transaction would be subject to sales tax if the transaction had occurred wholly within the State of Wyoming." (emphasis added)

Chap. IV, § 8 provides:

"When tangible personal property is purchased in another state and is brought into Wyoming for use, the burden is upon the purchaser to show that there was a bona fide first use of the property outside the State of Wyoming."

The Board properly concluded that it is a use of the property in the manner for which it was designed, constructed or intended that constitutes a "first use" as that phrase was intended by the Wyoming Tax Commission in Chap. IV, § 3. When making the determination as to whether the first use of the property occurred in Wyoming or another state, the Tax Commission looks to the nature of the property, its intended use, and whether the property was actually used in that manner in the other state. We hold that the Board properly found that the first use in this case was the incorporation of the pipe into the Shute Creek CO_2 pipeline.

We next address Exxon's claim that the Board should have granted Exxon a credit for the tax paid to Colorado. As noted earlier, the general goal of use taxes is to place in-state sellers on the same footing as out-of-state sellers. Annotation, *Use Tax — Credit for Out-of-State Taxes*, 31 A.L.R.4th 1206 (1984). In furtherance of this goal, many states, including Wyoming, grant credits against their use taxes for sales taxes actually paid to other states on the same property. Testimony at the Board's hearing from a representative of the Department indicates that it is the routine practice of the Department to grant an offsetting credit for sales taxes legally imposed by another state. In this proceeding, however, the facts supported the Department's decision to refuse the credit. In its order, the Board found that the tax paid by Exxon to Colorado was a use tax and not a sales tax under Colorado regulation 26.202, Colorado Administrative Code. There is no statute, regulation or applicable principle of law which requires the Board to grant a credit for a use tax paid in another state. Under these circumstances, we are compelled to hold that the Board properly denied Exxon a credit for the use tax paid in Colorado.

Exxon finally contends that the imposition of the Wyoming use tax on the use of the pipe in Wyoming is an unconstitutional burden on interstate commerce in violation of the commerce clause of the United States Constitution and that the application of the tax results in double taxation of the pipe. Section 8 of Art. I of the United States Constitution states that "Congress shall have Power * * * to regulate Commerce * * * among the several States."

The seminal case regarding the issue of validity of a state use tax vis-a-vis the commerce clause is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). In that

case, the United States Supreme Court articulated a four-prong test for analyzing whether a particular state tax can be upheld under the commerce clause. According to *Complete Auto*, a tax will survive a commerce clause challenge "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079. Here, petitioner argues that the tax in question fails to fulfill the second and third requirements of the test, that it is not fairly apportioned, and that it discriminates against interstate commerce.

The commerce clause does prohibit state regulations that either discriminate against interstate commerce or impose a burden on commerce that clearly outweighs the legitimate local benefits produced by the regulation. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937). In *Complete Auto*, however, the Supreme Court rejected the abstract notion that interstate commerce is immune from state taxation. *Complete Auto*, 430 U.S. at 288, 97 S.Ct. at 1083. The Court recognized that, with certain exceptions, interstate commerce could be required to pay its fair share of state taxes. *Complete Auto*, 430 U.S. at 281, 97 S.Ct. at 1080. Moreover, the Constitution does not prohibit uniform nondiscriminatory taxes on property merely because that property was subject to tax elsewhere. Nowak and Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. Davis L.Rev. 273, 300 (1987).

The taxing scheme employed by Wyoming fulfills each prong of the *Complete Auto* test: (1) the activity being taxed has a substantial nexus to the taxing state; the pipe was delivered in Wyoming and installed in a pipeline operating solely in this state; (2) it is fairly apportioned, since it taxes only the use of the pipe in Wyoming; (3) it does not discriminate against interstate commerce because the tax is designed to compensate the State for revenue lost on out-of-state purchases of goods used in this state and is equal to the sales tax on the same goods had they been purchased in Wyoming, W.S. 39-6-404(a); and (4) it is fairly related to state-provided services that facilitate Exxon's use of the pipe in Wyoming, including fire and police protection for the pipeline facilities and state maintenance of roads to the area. *See D.H. Holmes Co., Ltd.* v. *McNamara*, 485 U.S. 24, , 108 S.Ct. 1619, 1624, 100 L.Ed.2d 21 (1988). Because each of the prongs is fulfilled, we hold that the use tax

imposed by the Board does not violate Art. I, § 8 of the United States Constitution. We need not speculate whether the tax Exxon voluntarily paid Colorado could survive this same analysis.

In light of the foregoing, we hold that the Board's decision was not arbitrary or capricious, an abuse of discretion, nor in excess of statutory authority. The Board's decision was supported by substantial evidence.

Affirmed.

URBIGKIT, Justice, dissenting.

Appellant, Exxon Corporation (Exxon), purchased Japanese manufactured pipe for construction of its billion dollar Shute Creek to Rock Springs, Wyoming carbon dioxide natural gas production plant. The raw pipe was shipped by boat to Portland, Oregon, reloaded by rail, and unloaded in Fort Collins, Colorado. Following processing, the pipe was reloaded for delivery to the industrial plant for line installation in Wyoming. With an invoice price of approximately $13 million, Exxon paid a $421,839.38 tax to the state of Colorado, $395,396.84 plus interest of $26,442.54, calculated by a three percent transaction tax. It is the additional $703,551.28 tax assessed by the Wyoming Department of Revenue and Taxation as a use tax computed at four percent, $527,195.79 plus $176,355.49 in interest, which creates this appeal.

I dissent philosophically in opposition to a double tax imposed with both adverse affect on interstate commerce and significant contribution to the appearance of Wyoming as inhospitable to desperately needed economic development. Technically, I would find a first use in Colorado, as contrary to the conclusion of the Wyoming Department of Revenue and Taxation, with resulting credit to be given by Wyoming for the Colorado tax paid. Present justification for the double personal property enterprise or transaction tax following acquisition and initial processing in Colorado and reshipment for final installation in Wyoming on the basis that the tax in Colorado was a use tax and not a sales tax fails, in my opinion, to satisfy a commerce clause federal constitutional challenge.

The Colorado events require factual examination. The pipe was unloaded in Portland, Oregon, shipped by interstate commerce, probably through Wyoming, to Fort Collins to be processed for ultimate use, and then reloaded and shipped for installation in Wyoming. Amended purchase orders were executed to secure the pipe

preparation services of Energy Coating Company (Encoat) in Fort Collins, which accepted delivery from the Japanese shipper, Marubeni American Corporation, as an agent for Exxon. Processing by Encoat in Fort Collins included unloading, inspection, sandblasting, coating and reloading as a 90 to 120-day process, totalling an order value subject to time adjustments of $709,500. A third-party hauler accepted delivery from Encoat to deliver the pipe to the Exxon plant site in Wyoming. Exxon took technical possession and acquired title to the pipe following delivery "F.O.B.," where payment was made to the vendor. This record reveals no conflict of fact on these transactional events.

The significant dispute in this appeal considers whether a first use and consequent taxable event occurred in Colorado and, if so, whether there was a basis upon which credit against that tax should have been given on the subsequent tax levied in Wyoming. In order to escape the persuasion of constitutional arguments otherwise available, it is the apparent thesis of the Wyoming Department of Revenue and Taxation that payment of the tax in Colorado was an unnecessary gift and only Wyoming had a right to tax the product during transit and until actually consumed in use at the Wyoming gas plant. The majority rejects the first use in Colorado as "merely processing necessary to prepare the pipe for its use intended, i.e. its installation into and ultimate use as part of the Shute Creek C02 pipeline in Wyoming."

Thus presented are the strange ingredients in this case. First, it is said the pipe was not used in Colorado, it is then argued the Colorado tax was a use tax, and since the Colorado assessment was for a use tax, to be opposite of a sales tax, no credit would be given for the Wyoming tax. I perceive a clear first use in Colorado to process for ultimate usability. Next, I find no constitutional basis to differentiate the transactional tax in Colorado to be a use tax and then discern the pipe was not used until final destination in Wyoming.

In simple yet absolute terms, this adaptation by taxing authorities as now approved by this majority permits a double taxation of a product in the interstate stream of commerce. It would be no different than if the manufacturing exemption might be ignored so each jurisdiction could assess the transactional tax on raw materials and components until the finished car could be completed and finally

delivered to a Wyoming buyer. By then, the tax burden would make the price beyond the capacity of most prospective purchasers. The all-embracing Wyoming depression, as a product of the national decade of greed of the 1980's, needs no acceleration from appearances of additional tax greed when wealth producers and not wealth removers are required to restore the economic capacities for this state.

My review of the premier United States Supreme Court decisions does not lead to a countervailing persuasion. In the Grand Coulee Dam construction case, Justice Cardozo said:

> A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. * * *
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> * * *
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> Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

Henneford v. *Silas Mason Co.*, 300 U.S. 577, 581-84, 57 S.Ct. 524, 81 L.Ed. 814 (1937). Consequently, we can see the logic of Justice Cardozo would deny validity to the dual tax imposed here.

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, reh'g denied 430 U.S. 976, 97 S.Ct. 1669, 52

L.Ed.2d 371 (1977) does not lead to a contrary persuasion. A general review of the United States Supreme Court decisions in these cases reveals two categories. The first category is a gross receipts tax and the second is, as present here, a personal property acquisition or use tax. Emplaced in this case as different from *Complete Auto Transit, Inc.*, which was measured by gross receipts, and similar to *Henneford*, which was measured by product acquisition, interstate commerce can be differently affected by embracing tax as an acquisitions tax rather than a gross receipts tax. Applying the *Complete Auto Transit, Inc.* criteria as a broader transactional tax limitation, we are still presented discrimination against interstate commerce as a result from the double tax assessed here, first by Colorado and then again after initial processing by Wyoming. Likewise, as a matter of definition, a double tax is not fairly apportioned (prong 2 of the test in *Complete Auto Transit, Inc.*). W.S. 39-6-505(a)(iii) requires that Wyoming's taxation system be in harmony with the laws and constitutions of the United States and this state. It was not altruistic of the legislature to provide this exemption, it is founded in constitutional law to assure the transactional tax is constitutional.[1]

Nor are the limiting requirements of the Rules and Regulations of the Wyoming Tax Commission-Department of Revenue and Taxation, Chapter IV, Sections 3 and 8 altruistic either. Those regulations recognize that double application of the transaction tax impinges upon the Cardozo criteria prohibiting dual taxation from the state burden impressed upon interstate commerce. Unfortunately, and I suggest unconstitutionally, we accord general recognition to the transaction tax designated as a sales tax, but with undefinable logic to not apply where our state authorities determine that the foreign state tax was a use tax. It is not unreasonable to reflect if used there, it cannot be re-used for constitutional taxing purposes here. Recognizing the second character of reversible agency action which is found to be contrary to constitutional right, power, privilege, or immunity, I would reverse this decision and require appropriate apportionment to avoid a double burden on the property when it moves into Wyoming through the interstate commerce stream. How much more significant can we find a burden on

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[1] In addition to the constitutional basis for this exemption, the powers of the special interests can be found in approximately thirty other exemptions for sales and use tax within twenty-four specific provisions of the sales tax, W.S. 39-6-405, and thirteen other exemptions of the use tax, W.S. 39-6- 505.

interstate commerce than are accommodated by these facts. Had the Encoat plant been located in Cheyenne, this pipe could only have been taxed once; but with location of first processing in Colorado, a dual tax on the same transaction is created.

In technical character, this appeal presents two separate inquiries. The first is procedural in analysis of the standard of deference to be given to the first use decision of the Wyoming Department of Revenue and Taxation. The second constitutionally implicates the unapportioned double tax on the pipe derived separately from acts of both Colorado and now Wyoming as it affects interstate commerce within the purview of *Complete Auto Transit, Inc.* and the "internal consistency" criteria concept by the United States Supreme Court in more recent cases, including most currently, *Goldberg* v. *Sweet*, ___ U.S. ___, 109 S.Ct. 582, 102 L.Ed.2d 67 (1989).

Under the first issue, the majority introduces its opinion as though the Wyoming State Board of Equalization's decision involves a question of fact to which judicial deference is appropriate during review. I would argue the Wyoming State Board of Equalization's decision involves a question of law to which deference is inappropriate. This majority gives no deference to the view of the law taken by the trial court or administrative agency. We review legal conclusions for correctness as an original inquiry. *Griffin* v. *Bethesda Foundation*, 609 P.2d 459 (Wyo. 1980); *Ron Case Roofing and Asphalt Paving Inc.* v. *Blomquist*, 773 P.2d 1382 (Utah 1989); *Pulsfus Poultry Farms, Inc.* v. *Town of Leeds*, 149 Wis.2d 797, 440 N.W.2d 329 (1989). A reviewing court is directed to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." W.S. 16-3-114(c). While the latter portion of this statute seems sufficient to direct this court to determine the Wyoming Department of Revenue and Taxation's meaning of "first use" under the statutory framework of "use" provided by the legislature in W.S. 39-6-502(a)(vii), *BHP Petroleum Co., Inc.* v. *State, Wyoming Tax Com'n*, 766 P.2d 1162, 1165 (Wyo. 1989) guides our understanding of when a question for review is one of law. *BHP Petroleum Co., Inc.* draws support from *Rocky Mountain Oil and Gas Ass'n* v. *State*, 645 P.2d 1163 (Wyo. 1982), which deals in part with the intersection of a declaratory judgment action and a court also serving as an appellate court for the same issue. The declared principle

which guides the granting or withholding of declaratory relief by that court is the guiding principle which separates questions of law from questions of fact.

> [W]here the relief desired is in the nature of a substitution of judicial decision for that of the agency on issues pertaining to the administration of the subject matter for which the agency was created, the action should not be entertained. If, however, such desired relief concerns the validity and construction of agency regulations, or if it concerns the constitutionality or interpretation of a statute upon which the administrative action is, or is to be, based, the action should be entertained.

Id. at 1168.

Accordingly, I would not defer to the Wyoming Department of Revenue and Taxation's construction of "first use" as the "use of the property in the manner for which it was designed, constructed or intended." I would hold under W.S. 16-3-114(c)(ii)(C) the Wyoming Department of Revenue and Taxation acted in excess of its authority as it is not authorized to overwhelm the effect of the legislature's definition of "use" by the construction given its term "first use."

The Wyoming legislature defined "use" to mean "the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract." W.S. 39-6-502(a)(vii) (emphasis added). I would confine the application of the Wyoming Department of Revenue and Taxation's term "first use" to operate only within the parameter established by the legislative definition of "use."

There is no dispute in the record that Exxon took possession of the pipe in Colorado by contract and exercised a power of ownership by contracting to have the pipe coated with epoxy. This is the exercise of "any right or power over tangible personal property incident to ownership * * *." W.S. 39-6-502(a)(vii) (emphasis added). The legislature's definition of "use" captures the transaction which occurs by Exxon's exercise of a power of ownership. If a transaction can be captured by the legislature's definition of "use," I would not permit that transaction to escape capture by the construction of a term provided by an agency. I believe the Wyoming State Board of

Equalization's conclusion of what the Wyoming Department of Revenue and Taxation meant by "first use" is improper under such clear language by the Wyoming legislature.

My dissent on the first issue is not confined to the issue of deference on a question of law. I do not understand the precedent relied on by the majority to support the need for judicial deference to an agency alongside the facts in this case.

In *Safety Medical Services, Inc.* v. *Employment Sec. Com'n of Wyoming*, 724 P.2d 468, 472 (Wyo. 1986), cited by the majority, ante at 6, *Safety Medical Services, Inc.* argued the plain language of a Wyoming statute was sufficient to undermine the Wyoming Employment Security Commission's interpretation of what constituted "misconduct." We disagreed because the definition given "misconduct" by that agency was "in accord with definitions in other jurisdictions and expresses the plain, commonly understood meaning of the word misconduct." *Id.* at 472. We held that way because we saw the Wyoming Employment Security Commission's definition of misconduct to be "in accord with the intent of the legislature." *Id.* at 473. For the reasons explained above, this seems not to be the case here. I do not find where the construction given "first use" by the Wyoming Department of Revenue and Taxation is in accord with other jurisdictions, nor do I find that definition to be the "commonly understood meaning" of the phrase "first use." See *Maryland* v. *Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981); *Great American Airways* v. *Nevada State Tax Com'n.*, 101 Nev. 422, 705 P.2d 654 (1985), *cert. denied* 479 U.S. 817, 107 S.Ct. 74, 93 L.Ed.2d 31 (1986); and *United Parcel Service, Inc.* v. *State, Dept. of Revenue*, 102 Wash.2d 355, 687 P.2d 186 (1984); *cf. Burroughs Corp.* v. *State Bd. of Equalization*, 153 Cal.App.3d 1152, 200 Cal.Rptr. 816, 820 (1984), "primary purpose" test used to resolve taxable use from exempt use. The argument can reasonably be made that had the Wyoming Department of Revenue and Taxation's meaning of "first use" been commonly understood, it would have unveiled the sources which indicate such common construction accorded "first use."

As for the two remaining precedents cited by the majority, *Trout* v. *Wyoming Oil and Gas Conservation Com'n*, 721 P.2d 1047, 1049 (Wyo. 1986) says no more than this court will not substitute its

judgment for the agency regarding the findings or conclusions necessary to questions of fact. *Board of County Com'rs of Teton County* v. *Teton County Youth Services, Inc.*, 652 P.2d 400, 411 (Wyo. 1982) simply explains the need for a record to be developed for judicial review. Both propositions are established principles in Wyoming law, but do not add to the majority's dialogue.

Finally, this result collides with common sense. The Wyoming Department of Revenue and Taxation held that Exxon must pay a use tax to Wyoming because the tax it paid Colorado was actually a use tax and not a sales tax — for which credit would have been given; yet if the tax paid in Colorado was actually for its use of the property, how could "first use" occur in Wyoming?

While I disagree with the majority that Wyoming law permits an agency conclusion that Exxon's first use of its property in Colorado was not "first use", I do agree there is no state imposed requirement that Wyoming grant to Exxon a credit against our use tax for the "use tax" paid to Colorado. Beyond that narrowing to our disagreement, I would hold the requirement to grant that credit is imposed by the United States Constitution. If our national constitution requires a credit under the facts of this case, the answer to Exxon's third issue, that Wyoming's failure to grant it credit collides with the commands of the Commerce Clause, disposes of the second issue.

This majority adduces that the Wyoming State Board of Equalization was correct in concluding that the Wyoming Department of Revenue and Taxation properly characterized the transactional tax paid to Colorado to be a use tax rather than a sales tax. That characterization is required to avoid the requirement under Wyoming law that a sales tax legally imposed by and paid to another state be credited against our use tax. Wyoming now imposes a use tax on property for which it is claimed that only a use tax was paid to Colorado. This majority then detects no constitutional hardship to multiple use taxes under this scenario. That conclusion and the argument used to support it have yet to be finally tested since the

United States Supreme Court has not decided if the national constitution requires a sales or use tax paid in one state be credited against a use tax assessed in another state.[2]

For the majority to be confident in their claim, their supporting argument should account for more than the four-pronged test in *Complete Auto Transit, Inc.*, 430 U.S. 274. It should also account for the relatively recent, *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545, *reh'g denied* 464 U.S. 909, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983), and obviously evolving, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), "internal consistency" test now used to measure cumulative tax burdens from multiple taxes on interstate commerce. Although this particular test is new, the problems arising from notions of fair apportionment and interstate discrimination from cumulative tax burdens were recognized a half century ago. So understood, this "internal consistency" test relates to the second and third prongs of the *Complete Auto Transit, Inc.* test. The question of effective discrimination against interstate commerce cannot be answered by reciting Wyoming's independent right to tax Exxon's use of its pipe.

> *[T]he state may not impose certain taxes on interstate commerce,* its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but *because other states also may have the right constitutionally,* apart from the commerce clause, to tax the same thing *and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.*

International Harv. Co. v. Department of Treasury of State of Indiana, 322 U.S. 340, 358, 64 S.Ct. 1019, 1035, 88 L.Ed.2d 1313 (1944)

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[2] Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 160-61 (1988); Nowak & Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. Davis L. Rev. 273, 275 n.6 (1987); L. Tribe, *American Constitutional Law*, at 458 n.26 (1988). See Williams v. *Vermont, 472 U.S. 14, 21-22, 105 S.Ct. 2465, 2471, 86 L.Ed.2d 11 (1985); Southern Pac. Co.* v. *Gallagher*, 306 U.S. 167, 172, 59 S.Ct. 389, 391, 83 L.Ed. 586 (1939); and *Henneford*, 300 U.S. at 587.

(emphasis added).[3] There is an easy way to see the danger which the "internal consistency" test appears designed to detect. Imagine corporations as ships and taxes as barnacles. If ships acquire new barnacles at each state line, there will come a point when the ships which make the longest journeys will exhibit the most drag because they will have acquired the most barnacles. These ships are disadvantaged unfairly relative to the local carriers and ultimately may not competitively get to a particular final destination.

In *Container Corp. of America*, 463 U.S. 159, the United States Supreme Court announced an "internal consistency" test which attached to apportionment questions on state income taxes for interstate businesses. Under the "internal consistency" approach, the United States Supreme Court imagined what would happen if all the states duplicated the defendant-state's taxing scheme. To pass constitutional muster, the formula could not result in "more than all of the unitary business' income being taxed" if repeated by all states. *Id.* at 169.

In *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540, *reh'g denied* 469 U.S. 912, 105 S.Ct. 285, 83 L.Ed.2d 222 (1984), the court's decision of whether West Virginia's business and occupation tax scheme was constitutionally acceptable depended on the outcome of the "internal consistency" test applied to a non-income tax scheme inquiry. In hindsight, the elasticity to the "internal consistency" test first appeared in *Armco, Inc.* when the test moved effortlessly from income tax adaptations to excise tax systems.

After *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), it became obvious the "internal consistency" test was gaining currency in the high court's vocabulary of commerce clause analysis. In discrediting *General Motors Corp.* v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430, *reh'g denied* 379 U.S. 875, 85 S.Ct. 14, 13 L.Ed.2d 79 (1964), *overruled sub nom. Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), relied on by Washington in *Tyler Pipe Industries, Inc.*, the United States Supreme Court said that case was

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[3] *See* Hellerstein, *supra n.2*, 87 Mich. L. Rev. at 139 n.13. In concept, a state might have taxed on an ad valorem basis, the transactional facts of a boat unloading and reloading for land transportation.

not controlling because it required "the taxpayer to prove that specific interstate transactions were subjected to multiple taxation in order to advance a claim of discrimination," *Tyler Pipe Industries, Inc.* 483 U.S. at 242, a requirement "categorically rejected" in *Armco, Inc.*, 467 U.S. 638. The burden of proof has been relocated from the interstate commerce plaintiff to the defendant state. Also, the United States Supreme Court made more than a passing reference to *Henneford*, 300 U.S. 577. The United States Supreme Court stressed the importance in *Henneford*, that the use tax did not apply to any article of tangible personal property "the sale or use of which had already been taxed at an equal or greater rate under the laws of Washington or some other state." *Tyler Pipe Industries, Inc.*, 483 U.S. at 245. The dissent in *Tyler Pipe Industries, Inc.*, 483 U.S. at 255 argued "the Court is compelled to overrule" the large block of cases which permitted a more liberal construction of state power to tax. The United States Supreme Court indeed appears poised to administer a more conservative and restrictive construction of state taxing power.

In *American Trucking Associations, Inc.*, 483 U.S. 266, the "internal consistency" test again demonstrated a new muscularity by its application to Pennsylvania's trucking axle flat tax scheme. The truckers had argued Pennsylvania's registration fees, fuel consumption taxes and "flat taxes" violated the commerce clause. The United States Supreme Court majority allowed the registration and fuel tax schemes before turning to the flat tax scheme. The registration fees posed no "impermissible interference with free trade because every State respects the registration of every other State." *Id.* at 283. Across-the-board state reciprocity for registration fees paid to other states makes these fees constitutional. Fuel taxes apportion themselves, of course. The Pennsylvania flat tax scheme, however, had gone beyond requiring interstate commerce simply to pay its way.

The "internal consistency" test was fatal to Pennsylvania's flat tax scheme because of the cumulative burden to interstate commerce if all other states adopted a like scheme. If all states cannot adopt the scheme simultaneously without crippling interstate commerce, no one state is allowed to do so.

The point in bringing up these cases is to show that the "internal consistency" test appears to be growing.

> In its guarantee of a free trade area among States, however, the Commerce Clause has a deeper meaning that may be implicated even though state provisions, such as the ones reviewed here, do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory.

Id. at 281. See also discussion of internal consistency by the Michigan Supreme Court in *Trinova Corp.* v. *Department of Treasury*, 445 N.W.2d 428 (Mich. 1989).

That Wyoming chooses to call the Colorado tax a use tax should prove no impenetrable barrier to "internal consistency" test analysis.

> [T]he trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or "use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as *only one tax is applied* and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.

International Harv. Co., 322 U.S. at 358-59 (emphasis added).

The United States Supreme Court this past term returned to the internal and external consistency taxation review in the Illinois telecommunications excise tax case of *Goldberg*, 109 S.Ct. 582. It is significant for that decision that a credit against the Illinois tax was provided by the law for taxes paid "in another State on the same telephone call which triggered the Illinois tax." *Id.* at 586. At issue for challenged invalidity under the commerce clause was taxpayer's contention that the tax was not fairly apportioned as the second prong of the *Complete Auto Transit, Inc.* test. Writing for the six member majority, Justice Marshall discerned:[4]

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[4] See anticipatory discussion of *Goldberg* in Hellerstein, *supra n.2*, 87 Mich. L. Rev. at 186. *See also* Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Lawyer 37 (1987) and Note, *The "Internal Consistency" Test is Alive and Well: Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 41 Tax Lawyer 587 (1988).

In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. *See, e.g., Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983). But "we have long held that the Constitution imposes no single [apportionment] formula on the States," *id.*, at 164, 103 S.Ct., at 2939, and therefore have declined to undertake the essentially legislative task of establishing a "single constitutionally mandated method of taxation." *Id.*, at 171, 103 S.Ct., at 2943; see also *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 278-280, 98 S.Ct. 2340, 2347-2348, 57 L.Ed.2d 197 (1978). Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. *Scheiner*, 483 U.S., at , 107 S.Ct., at ; *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540 (1984); *Container Corp., supra*, 463 U.S., at 169-170, 103 S.Ct., at 2942-2943.

To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. 463 U.S., at 169, 103 S.Ct., at 2942. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. * * *

* * *

The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed.

Goldberg, 109 S.Ct. at 588-89.

The thesis of *Goldberg* fails completely here since Wyoming provided neither credit nor apportionment for the pipe acquisitional tax as separately levied by both Wyoming and Colorado. Consequently, I would perceive an inherent "internal consistency" inconsistency with the present Wyoming application of its unapportioned second tax to the Exxon pipe.

I would reverse and remand to require tax apportionment between Wyoming and Colorado by credit for the benefit of the taxpayer.

APPENDIX B

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF APPEAL OF EXXON COMPANY, U.S.A. FROM AUDIT DEFICIENCY ASSESSMENT # S/U 300	))))	Docket No. A-87-11

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER

THIS MATTER having come before the State Board of Equalization for hearing on October 27, 1987, and the Petitioner, Exxon Company, U.S.A., appeared by and through its attorney, Kenneth A. Reither; and the Department of Revenue and Taxation appearing by and through its attorney, Robert J. Walters, Assistant Attorney General; and both parties having presented evidence and testimony, and the Board having duly considered all matters contained in the record herein, and being otherwise fully advised in the premises, generally finds and concludes as follows:

FINDINGS OF FACT

1. Between the months of February and May 1985, the Petitioner purchased 258,000′ of 24″ line pipe from Marubeni American Corporation under the terms "F.O.B. Railcar at Encoat Yard in Fort Collins, Colorado." Said pipe was shipped from Kasaoka, Japan, via Portland, Oregon, to Fort Collins, Colorado, where the pipe was inspected, sand blasted, and coated with a thin-film epoxy by Energy Coating Company (Encoat) before shipment to Wyoming by a separate contractor hired by Exxon to install the pipe. The pipe was to be used in the construction of the Shute Creek to Rock Springs CO_2 pipeline.

2. Marubeni American Corporation issued to the Petitioner two invoices for the pipe. The first invoice was dated February 12, 1985, and totaled $6,798,532.06. The second invoice was dated April 15, 1985, and totaled $6,381,362.77. Exxon paid these invoices which

together comprised the total purchase price for the pipe paid by Exxon of $13,179,894.83.

3. The Wyoming Department of Revenue and Taxation (Department) conducted an audit of the Petitioner's records for the period of March 1, 1983, through February 28, 1986. The Department determined that Petitioner was liable for payment of use tax to the State of Wyoming on the pipe purchased by Petitioner from Marubeni American Corporation.

4. Representatives of the Petitioner and the audit examination staff met several times to attempt to resolve the dispute concerning Petitioner's liability for use tax on such line pipe in light of use taxes paid to the State of Colorado, in which it appears:

a. Petitioner determined that the State of Colorado was due a tax on the purchase of such pipe and filed an amended return with the State of Colorado, remitting the corresponding amount of tax. (Petitioner's Exhibit No. 3).

b. The Department issued a final administrative decision dated May 20, 1987, indicating that the tax paid to the State of Colorado was a use tax and that Petitioner was not entitled to an offsetting credit against the Department's assessment of use tax imposed on such pipe on account of taxes paid to the State of Colorado.

5. Petitioner filed a Notice of Appeal with the State Board of Equalization for the State of Wyoming on June 10, 1987.

6. At the hearing, Robert L. McKee, Director of the Policy Division, Department of Revenue and Taxation, testified that:

a. The State of Wyoming was a member of the Multistate Tax Compact until 1978, when the State was no longer eligible for membership because the applicable enabling legislation had been repealed by the Wyoming Legislature.

b. One of the major reasons for such withdrawal was occasioned by information from the Department indicating that the Multistate Tax Compact required credit against Wyoming use tax if a sales or use tax was first paid to another state which imposed a tax, even if Wyoming was the state in which the corresponding tangible personal property was ultimately destined for use.

c. After withdrawal of membership in the Multistate Tax Compact, the Department provided notice that credits would not be provided for use taxes paid to another state. This practice of providing notice that credits would not be provided for use taxes paid to another state continues to the present in the form of tax related information provided to contractors performing construction projects within the State of Wyoming. (Department's Exhibit "A").

d. Discussions had taken place on several occasions between Mr. McKee and representatives of Exxon Co., U.S.A., and its contractors prior to construction of the Shute Creek facility. Mr. McKee advised the latter that credits would not be provided for use taxes paid to other states and that transactions should be structured to avoid multiple taxation where possible.

e. Since withdrawal of membership from the Multistate Compact, the Department has consistently administered the policy that use taxes paid to another state do not give rise to an offsetting credit to use taxes due to the State of Wyoming.

f. In circumstances in which tangible personal property is delivered to this State for storage or other taxable services but are destined for ultimate delivery and use in another state, such property is not subject to a Wyoming use tax, although the services, such as repair or fabrication, which occur and relate to such property while in the state are subject to Wyoming sales tax.

CONCLUSIONS OF LAW

7. The State Board of Equalization (Board) is mandated to review State excise taxes, and "[h]old hearings after due notice in the manner and form provided in the Wyoming Administrative Procedure Act [§§ 16-3-101 through 16-3-115] and its own rules and regulations of practice and procedure." W.S. 39-1-304(a)(ix).

8. The Board is required to "[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes . . . ." W.S. 39-1-304(a)(iv).

9. The rules of practice and procedure for appeals before the Wyoming State Board of Equalization involving taxation matters contemplate appeals from final administrative decisions of the Department. Rules and Regulations of the Wyoming State Tax

Commission, Chapter XVII, Section 3. Such rules require that appeals must be filed within thirty (30) days of any final administrative decision of the Department.

10. Petitioner's Notice of Appeal in this matter was timely filed, and the Board has jurisdiction to determine this matter.

11. Pursuant to W.S. 39-6-504, persons storing, using or consuming tangible personal property in this state are required to pay a use tax on the sales price of such property in accordance with the applicable rate.

a. "Use" is defined as "the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract." W.S. 39-6-502(a)(vii).

b. "Storage" is defined as the "keeping or retention in this state of tangible personal property purchased by a vendor for any purpose except for sale in the course of business or subsequent use outside the State." W.S. 39-6-502(a)(iv).

12. A use tax is complementary to a sales tax, and the former is intended to apply to sales of goods bought outside the state and brought into the state so as to put such goods on an equal footing with goods purchased in the state subject to the sales tax. Morrison-Knudsen Co. v. State Board of Equalization, 58 Wyo. 500, 124 P.2d 927 (1943). Although Wyoming use tax is measured by a percentage of the purchase price of tangible personal property, it is imposed on the privilege of using, storing or consuming such tangible personal property within this State. Cf., Whitcomb v. Commissioner of Taxes, 479 A.2d 164, 166 (Vt. 1984).

13. The rules and regulations of the Wyoming State Tax Commission provide in pertinent part:

a. "The purchase or lease of all tangible property outside this state for first use, storage or consumption within this state, is subject to use tax, providing the same transaction would be subject to sales tax if the transaction had occurred wholly within the State of Wyoming." Rules and Regulations, supra, Chapter IV, Section 3.

b. "When tangible personal property is purchased in another state and is brought into Wyoming for use, the burden is

upon the purchaser to show that there was a bona fide first use of the property outside the State of Wyoming." Rules and Regulations, supra, Chapter IV, Section 8.

14. Purchases made and subject to a Wyoming sales tax are also exempt from the Wyoming use tax. W.S. 39-6-505(a)(i).

15. It is undisputed that the pipe which is the subject of the assessment in this matter was purchased outside the State of Wyoming for ultimate installation in the State of Wyoming by the Petitioner.

16. The "first use" of the pipe was its installation in Wyoming, not the inspection, sand blasting, and coating, in the State of Colorado.

17. Petitioner is liable for payment of use tax to the State of Wyoming based upon the purchase price of the pipe.

18. Although it is concluded that the Petitioner is liable for payment of Wyoming use tax in this matter, this Board must also consider whether any statutory or constitutional provisions limit in whole or in part the full assessment of tax.

19. Purchases which the State of Wyoming is prohibited from taxing under the laws or constitutions of the United States or Wyoming are exempt from use tax. W.S. 34-9-505(a)(iii).

20. There is no specific Wyoming statutory provision which requires that a credit be granted against use taxes legally due the State of Wyoming on account of use taxes paid to another state which involve the same subject matter or transaction.

21. The State of Colorado assessed Petitioner a consumer use tax on the purchase price of the subject pipe apparently because such pipe was delivered initially within the State of Colorado.

22. Assuming that Colorado may legally impose use tax under such circumstances, it does not follow that the State of Wyoming may not impose use tax on the sales price of tangible personal property brought into this State for use in this State.

23. Under applicable regulations of the State of Colorado, a use tax may be imposed on any exercise or control by the owner or purchaser of tangible personal property in the State of Colorado,

whether such exercise constitutes the property's actual or ultimate usage. Regulation 26.202, Colorado Administrative Code.

24. The Wyoming use tax, on the other hand, in this instance relates specifically to the property's first use in this State, and prior delivery into the State of Colorado for coating purposes is not considered a first use outside of the state which would cause Wyoming use tax to be inapplicable in whole or in part.

25. Petitioner claims that imposition of Wyoming use tax on the subject transaction under the circumstances of this case results in multiple interstate taxation in violation of the Commerce Clause of the United States Constitution.

26. Although interstate commerce cannot be subject to multiple taxation under the Commerce Clause, interstate commerce and its instrumentalities are not totally immune from state taxation. Michigan-Wisconsin Pipe Line Co. v. Clavert, 347 W.S. 154, 74 S.Ct. 396, 98 L.Ed. 583 (1954).

27. Use taxes have been sustained when it has been demonstrated that the tax relates to an intrastate, taxable event which is separate from an interstate operation. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 611-12, 58 S.Ct. 736, 740, 82 L.Ed. 1043, 1049-50 (1938). The determination of whether there is an intrastate, taxable event depends on whether an item "comes to rest" within the state. Master Craft Engineering v. Dept. of Treasury, 141 Mich. App. 56, 366 N.W.2d 235, 242 (1985).

28. Because the pipe which is the subject of the Wyoming use tax assessment was ultimately delivered in this state for incorporation into a pipeline segment within this state, an intrastate, taxable event has occurred and the use tax is justified and is not violative of the Commerce Clause of the United States Constitution.

ORDER

IT IS THEREFORE HEREBY ORDERED that the use tax assessment of 4% in the sum of $527,195.79 plus interest at the rate of 12% per annum from and after the 31st day of May, 1985, and the penalty of $52,719.58 is affirmed; provided however the penalty

shall be waived if all tax and interest are paid within thirty days of this order.

DATED the *2nd* day of *March*, 1988.

WYOMING STATE
BOARD OF EQUALIZATION

/s/ SHIRLEY WITTLER
Shirley Wittler, Chairman

ATTEST:

/s/ THOMAS D. ROBERTS
Thomas D. Roberts,
Executive Secretary

APPENDIX C

Excerpt from Petition for Review filed by Exxon Corporation in District Court, Laramie County, Wyoming (March 31, 1988)

* * *

11. The Board's Order should be held unlawful and should be set aside for the following reasons:

> (c) The Board's Order is arbitrary and capricious, lacking statutory right, and contrary to constitutional right, power, privilege and immunity, because it imposes a burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution, because it deprives Exxon of Due Process of law under the United States Constitution and Wyoming Constitution and deprives Exxon of Equal Protection under the United States Constitution and the Wyoming Constitution.

* * *

APPENDIX D

List of Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates of Petitioner Exxon Corporation Pursuant to Rule 28.1*

AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Asakawa Sekiyu K.K.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited

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*Does not include companies with less than 5% Exxon Ownership

Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chinchaga Resources Limited
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Cynthia Gas Gathering Company Limited
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Divafi Pty. Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited

Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane — Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuchenberg Erdgas under Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Great Eastern Oil Limited
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH

Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Home Energy Company Ltd.
Home Oil Company Limited
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intamix Corporation
Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Ito Sekiyuten
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.

Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres SAREP
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft feur luzernisches Erdoel
Les Docks des Petroles d'Ambes
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Manito Pipelines Ltd.
Maple Leaf Petroleum Limited
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited
Mittelrheinische Erdgas Transport Gesellschaft mit beschreankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Hanikris Limited

Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
NAM — K 7 B.V.
NAM — K 14 B.V.
NAM — K 15 B.V.
NAM/CLOMS — K 8/K 11 B.V.
NAM/CLOMS — L 13 B.V.
NPC Services, Inc.
N. V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Limited
160837 Canada Limited
165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
165899 Canada Limited
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited

Oil Transport Company (Saudi Arabia) Limited
Oilship Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Progas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
S.O.P. — Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited

Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar" — PROLUMA S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI) Soci Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad — S.E.E.R.A.T.
Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage

Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company
(Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschraenkter
Haftung
Sun East Company Ltd.
Syncrude Canada Ltd.
Synergistics Industries Limited
204383 Enterprises Limited
363011 Alberta Limited
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
Texaco Canada Malaysia Inc.
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.

Tonen Maintenance K.K.
Tonen Properties Inc.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Tonex Company Limited
Tophus Quen Pty. Ltd.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Trans-Northern Pipelines Inc.
Transgaz Lavera
Trimin Resources Inc.
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG — Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
Ulan Coal Shippers Pty. Limited
United Industry Development Co., Ltd.
United Collieries Pty. Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center